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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 THE CONFEDERATED TRIBES
8 AND BANDS OF THE YAKAMA
9 NATION, a sovereign federally
recognized Native Nation,

10 Plaintiff,

11 v.

12 CITY OF TOPPENISH, a
13 municipality of the State of
Washington; YAKIMA COUNTY, a
14 political subdivision of the State of
Washington,

15 Defendants.

NO. 1:18-CV-3190-TOR

ORDER DENYING PRELIMINARY
AND PERMANENT INJUNCTION

16 BEFORE THE COURT is Plaintiff's Motion for Preliminary Injunction.
17 ECF No. 16. This matter was heard with oral argument on February 15, 2019.
18 The Court has reviewed the record and files therein, and is fully informed. For the
19 reasons discussed below, Plaintiff's Motion for Preliminary Injunction is
20 **DENIED.**

BACKGROUND

On October 3, 2018, Plaintiff the Confederated Tribes and Bands of the Yakama Nation filed a Complaint against Defendants City of Toppenish and Yakima County. ECF No. 1. Plaintiff alleges a violation of the Treaty of 1855 arising from “Defendants’ *ultra vires* exercise of criminal jurisdiction over enrolled Yakama members for alleged crimes occurring within the exterior boundaries of the Yakama Reservation.” *Id.* at 2, ¶ 1.1. Because “Defendants’ actions violated, and continue to violate, the rights reserved by the Yakama Nation in the Treaty of 1855,” Plaintiff seeks declaratory and injunctive relief. *Id.* at 4, ¶¶ 1.8-1.9.

On December 12, 2018, Plaintiff filed the instant motion for a preliminary injunction. ECF No. 16. Defendants jointly filed a response to Plaintiff’s motion on December 26, 2018. ECF No. 20.

FACTS

The following facts are drawn from Plaintiff’s Complaint and are essentially undisputed as relevant and material to resolution of the instant motion. As identified in the Complaint, there are two categories of facts in this case—facts that are largely historic and facts relating to the arrest of Leanne Gunn, a Yakama member, by City of Toppenish Police Officers. The facts relating to the arrest are fairly straightforward. On September 26, 2018, Toppenish Police Officers were

1 alerted that a “bait car,” deployed by the Toppenish Police Department to combat
2 auto theft, had been moved from its original location and was being driven within
3 the City of Toppenish. ECF No. 1 at 6, ¶ 5.1. Toppenish Police tracked the bait
4 car to 111 Branch Road, Toppenish, Washington, and requested law enforcement
5 assistance at that location. *Id.* at ¶ 5.2. Yakama Nation Police officers responded
6 to assist with the alleged vehicle theft. *Id.* at ¶ 5.5.

7 Once at the property, Toppenish Police detained the passenger in the bait
8 car, Ms. Gunn, who identified herself as a Yakama member. *Id.* at ¶¶ 5.3-5.4.
9 According to Plaintiff, Toppenish Police expressed their intent to charge Ms. Gunn
10 under state law despite the protest of Yakama Nation Police Officers who took
11 exception to Toppenish Police’s claim of jurisdiction over a Yakama member. *Id.*
12 at ¶ 5.5. Toppenish Police allegedly responded that they were exercising their
13 jurisdiction over Ms. Gunn consistent with the decision of Division Three of the
14 Washington Court of Appeals in *State v. Zack*, 2 Wash. App. 2d 667 (2018),
15 *review denied*, 191 Wash. 2d 1011 (2018). *Id.* at ¶ 5.6.

16 Toppenish Police then contacted the owner of the real property, Vera
17 Hernandez, who also identified herself as a Yakama member. *Id.* at ¶ 5.7.
18 Toppenish Police requested Ms. Hernandez’s consent to search her residence and
19 the garage located on the property to look for the suspected driver of the stolen
20 vehicle. *Id.* at ¶ 5.8. Ms. Hernandez consented to the search of both her residence

1 and the garage. *Id.* Though the suspected driver of the stolen vehicle was not
2 found during the search, another vehicle was found in a nearby field that had been
3 reported stolen in June of 2018. *Id.* at ¶ 5.10.

4 After the search concluded, Toppenish Police Officer Kyle Cameron asked
5 Yakama Nation Police Officers if they would obtain a search warrant for the
6 premises. *Id.* at ¶ 5.11. The Yakama Nation Police Officers declined the request,
7 citing insufficient evidence to find probable cause of a crime. *Id.* at ¶ 5.12.
8 Officer Cameron responded that Toppenish Police would obtain a state search
9 warrant for the property. *Id.* at ¶¶ 5.13-5.15. Officer Cameron prepared a
10 telephonic affidavit application for the search warrant, obtained a warrant from a
11 Yakima County Superior Court Judge, and Toppenish Police Officers executed the
12 search warrant on Ms. Hernandez’ property. *Id.* at ¶¶ 5.16-5.18.

13 According to Plaintiff, the facts described above are significant when viewed
14 in the context of the following historical facts. Under the Treaty of 1855, the
15 Yakama Nation reserved all rights not expressly granted to the United States,
16 including its inherent sovereign rights and jurisdiction over its enrolled members
17 and its lands both within and beyond the exterior boundaries of the Yakama
18 Reservation. *Id.* at 5, ¶ 3.1. Jurisdiction over the Yakama Reservation, as with all
19 Indian Country, rests with federal and Yakama authorities “except where Congress
20 in the exercise of its plenary and exclusive power over Indian affairs has expressly

1 provided that State laws shall apply.” *Id.* at 9, ¶ 5.21; *Washington v. Confed.*
2 *Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979).

3 In 1953, concerned with “the absence of adequate tribal institutions for law
4 enforcement” on “certain Indian reservations,” Congress enacted Public Law 280
5 (Pub. L. No. 83-280, 67 Stat. 588 (1953)), which required some states and
6 authorized others to assume criminal and civil jurisdiction in Indian Country within
7 a state’s borders. *Id.* at 10, ¶ 5.23 (quoting *Bryan v. Itasca Cty., Minn.*, 426 U.S.
8 373, 379 (1976)); *see* Pub. L. 83-280, 67 Stat. 588, 588-89 (1953). In 1957,
9 Washington enacted a law establishing state jurisdiction over any Indian
10 reservation for any tribe that requested the State’s assumption of jurisdiction. ECF
11 No. 1 at 10, ¶ 5.26; *Confed. Bands*, 439 U.S. at 474.

12 In 1963, Washington passed legislation allowing the State to assume civil
13 and criminal jurisdiction pursuant to Public Law 280 over “Indians and Indian
14 territory, reservations, country, and lands within this state,” with certain limited
15 exceptions. ECF No. 1 at 11, ¶ 5.27; *see* RCW 37.12.010. Specifically,
16 Washington did not assume jurisdiction over lands held in trust by the United
17 States or held by a tribe in restricted fee status, unless the tribe consented, except in
18 the following eight areas: (1) compulsory school attendance; (2) public assistance;
19 (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption
20 proceedings; (7) dependent children; and (8) operations of motor vehicles on

1 public roads. ECF No. 1 at ¶¶ 5.27-5.28; *see* RCW 37.12.010. The Yakama
2 Nation did not consent to State jurisdiction over its trust or restricted fee lands.
3 ECF No. 1 at ¶ 5.29.

4 In 1968, Congress amended Public Law 280 and repealed the option for
5 states to assume jurisdiction over Indian Country without tribal consent, making
6 tribal consent a prerequisite for any state assuming jurisdiction over Indian
7 Country. *Id.* at 12, ¶ 5.34; 25 U.S.C. § 1322(a). For Washington and other states
8 that had already assumed jurisdiction, Congress authorized the United States to
9 “accept a retrocession by any State of all or any measure of the criminal or civil
10 jurisdiction, or both, acquired by such State pursuant to the provisions of [Public
11 Law 280] as it was in effect prior to [the 1968 amendments].” ECF No. 1 at ¶
12 5.35; 25 U.S.C. § 1323(a). The President delegated the authority to accept
13 retrocessions to the Secretary of the Interior, in consultation with the Attorney
14 General. ECF No. 1 at 13, ¶ 5.36; *see* Exec. Order No. 11435 (Nov. 21, 1968), 33
15 Fed. Reg. 17339-01 (Nov. 23, 1968).

16 In 2012, the Washington State Legislature adopted a law codifying the
17 process by which the State could retrocede its Public Law 280 jurisdiction to the
18 United States. *See* RCW 37.12.160. The Yakama Nation filed a petition with the
19 Office of the Governor on July 17, 2012, asking the State to retrocede its civil and
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1 criminal jurisdiction over “all Yakama Nation Indian Country” and in five areas
2 listed in RCW 37.12.010. ECF Nos. 1 at 13, ¶ 5.38; 16-1 at 21, 25.

3 On January 17, 2014, Governor Jay Inslee issued a proclamation partially
4 retroceding civil and criminal jurisdiction previously acquired under Public Law
5 280 over Indians within the Yakama Reservation. ECF Nos. 1 at 14, ¶ 5.40; 16-1
6 at 25-27. Particularly relevant here, paragraph 3 of the Governor’s retrocession
7 proclamation specified that the State would “retrocede, in part, criminal
8 jurisdiction over certain criminal offenses,” and “retain[] jurisdiction over criminal
9 offenses involving *non-Indian defendants and non-Indian victims*.” ECF No. 6-1
10 at 26 (emphasis added). In a letter transmitting the proclamation to the Department
11 of the Interior (“DOI”) on January 27, 2014, Governor Inslee explained that the
12 State’s retrocession of criminal jurisdiction was intended to retain jurisdiction
13 whenever “non-Indian defendants *and/or* non-Indian victims” were involved. ECF
14 Nos. 1 at 14, ¶ 5.41; 16-1 at 30.

15 On October 19, 2015, DOI notified the Yakama Nation of the United States’
16 acceptance of “partial civil and criminal jurisdiction over the Yakama Nation.”
17 ECF Nos. 1 at 14, ¶ 5.42; 16-1 at 32. Regarding the “extent of retrocession,” DOI
18 stated that Governor Inslee’s proclamation was “plain on its face and
19 unambiguous.” ECF Nos. 1 at 16, ¶ 5.47; 16-1 at 36. Noting its concern that
20 “unnecessary interpretation might simply cause confusion,” DOI explained that

1 “[i]f a disagreement develops as to the scope of the retrocession, we are confident
2 that courts will provide a definitive interpretation of this plain language of the
3 Proclamation.” ECF Nos. 1 at 16, ¶ 5.48; 16-1 at 36. Pursuant to the DOI’s
4 instructions, the United States formally implemented retrocession on April 19,
5 2016, following significant coordination between the Yakama Nation, the United
6 States, the State of Washington, and local jurisdictions. ECF No. 1 at 18, ¶ 5.53.

7 On March 8, 2018, Division Three of the Washington State Court of
8 Appeals issued its decision in *State v. Zack*, 2 Wash. App. 667 (2018). The *Zack*
9 court held that, while the State of Washington had partially retroceded jurisdiction
10 to the Yakama Nation, the State retained criminal jurisdiction over crimes
11 occurring on deeded land within the Yakama Reservation that involve a non-
12 Indian, whether as a victim or defendant. ECF No. 1 at 19, ¶ 5.57; 2 Wash. App. at
13 676. On July 27, 2018, the Office of Legal Counsel for the United States
14 Department of Justice (“OLC”) issued a memorandum opinion addressing the
15 scope of Washington’s retrocession of criminal jurisdiction on the Yakama
16 Reservation, in which OLC concluded that “Washington has retained jurisdiction
17 over criminal offenses where any party is a non-Indian, as the Washington Court of
18 Appeals recently held in *State v. Zack*.” ECF Nos. 1 at 19, ¶ 5.58; 16-1 at 51-52.

19 Plaintiff asserts that, following the United States’ acceptance of partial
20 retrocession of jurisdiction within the Yakama Reservation, only the United States,

1 not the State of Washington, “has criminal jurisdiction over non-Indian versus
2 Indian crimes exclusive of Defendants.” ECF No. 1 at 20, ¶ 6.3. In other words,
3 Plaintiff maintains that the State retroceded full criminal jurisdiction over all
4 criminal offenses involving Indians as a defendant and/or victim. *See* ECF No. 16
5 at 2. Plaintiff alleges that, despite retrocession, Defendants have exercised *ultra*
6 *vires* criminal jurisdiction over Yakama members within the Yakama Reservation,
7 as evidenced by the September 26, 2018, arrest of Ms. Gunn and subsequent search
8 of Ms. Hernandez’ property. ECF No. 1 at 20-21, ¶ 6.4.

9 In the pending motion, Plaintiff requests a preliminary injunction “enjoining
10 Defendants, and all persons acting on Defendants’ behalf, from exercising criminal
11 jurisdiction arising from actions within the exterior boundaries of the Yakama
12 Reservation involving an Indian as a defendant and/or victim.” ECF No. 16 at 2.

13 DISCUSSION

14 I. Standing

15 The Court first considers Defendants’ argument that Plaintiff lacks Article
16 III standing to challenge the alleged infringement of sovereignty at issue in this
17 case. ECF No. 20 at 7-13. In order for a federal court to have subject-matter
18 jurisdiction over a claim, the plaintiff must have standing under Article III of the
19 Constitution to challenge an alleged wrong in federal court. *Warth v. Seldin*, 422
20 U.S. 490, 498 (1975). The Supreme Court has created a three-part test to

1 determine whether a party has standing to sue: (1) the plaintiff must have suffered
2 an “injury in fact,” meaning that the injury is a legally protected interest which is
3 (a) concrete and particularized and (b) actual or imminent; (2) there must be a
4 casual connection between the injury and the conduct brought before the court; and
5 (3) it must be likely, rather than speculative, that a favorable decision by the court
6 will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61
7 (1992). At the pleading-stage, “the party invoking federal jurisdiction bears the
8 burden of establishing these elements.” *Id.* at 561. Though the Court treats
9 pleading-stage factual allegations as true, plaintiff must allege facts that give rise to
10 a plausible inference that plaintiff is entitled to relief. *See Bell Atl. Corp. v.*
11 *Twombly*, 550 U.S. 544, 570-72 (2007).

12 Here, Defendants’ primarily dispute whether Plaintiff has established the
13 existence of a concrete, particularized injury in this case. Defendants argue that
14 Plaintiff fails to identify a “likelihood of substantial and immediate irreparable
15 injury,” and therefore lack standing to bring this claim. Plaintiff responds that it
16 has suffered an injury-in-fact because Defendants’ exercise of criminal jurisdiction
17 within the Yakama Reservation infringes upon Tribal sovereignty. ECF No. 22 at
18 8-9. The Court agrees that Plaintiff’s allegations are sufficient to confer standing.

19 Plaintiff alleges that Defendants’ assertion of criminal jurisdiction over
20 crimes within the Yakama Nation involving Indians, following the United States’

1 acceptance of Washington's retrocession, constitutes a violation of the Yakama
2 Nation's sovereignty. *Id.* at 9. Thus, "[t]he injury that the Yakama Nation has
3 sustained, and will continue to sustain without injunction, is a violation of its
4 sovereign legally protected rights." *Id.* Defendants do not dispute that they
5 asserted criminal jurisdiction over Yakama members on the Yakama Reservation
6 following retrocession, nor do they deny that they will continue to exercise such
7 jurisdiction in the future. To the contrary, Defendants maintain that they should
8 not be prevented, by Plaintiff or this Court, from "enforcing state criminal laws
9 within their own jurisdictions in contravention of state law." ECF No. 20 at 13.

10 The Court finds that actual infringements on a tribe's sovereignty, as alleged
11 by Plaintiff in this case, establishes "an invasion of a legally protected interest
12 which is (a) concrete and particularized, and (b) actual or imminent, not
13 conjectural or hypothetical." *Lujan*, 504 U.S. at 560. A tribe has a legal interest in
14 protecting tribal self-government from a state's allegedly unjustified assertion of
15 criminal jurisdiction over Indians and Indian Country. Congress, too, has a
16 substantive interest in protecting tribal self-government. *See Moe v. Confederate*
17 *Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 469 n.7 (1976).
18 Accordingly, the Defendants' alleged exercise of criminal jurisdiction over
19 Yakama members on the Yakama Reservation constitutes an affront to sovereignty
20 sufficient to confer standing. Plaintiff has alleged facts from which the Court

1 could reasonably infer concrete, particularized, and actual or imminent injury. *See*
2 *Lujan*, 504 U.S. at 560.

3 The Court finds that Plaintiff also satisfies Article III’s remaining
4 requirements—plaintiff’s injury-in-fact is “fairly traceable” to the “complained-of-
5 conduct of the defendant,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
6 103 (1998), and a favorable ruling would likely redress plaintiff’s injury. *Lujan*,
7 504 U.S. at 561. As noted, Defendants confirm that they exercised criminal
8 jurisdiction over Yakama members within the Yakama Reservation on September
9 26, 2018, and do not deny their intent to continue exercising criminal jurisdiction
10 within the Yakama Reservation. And, an injunction preventing Defendants from
11 exercising criminal jurisdiction would unquestionably prevent further alleged
12 violations of the Yakama Nation’s sovereignty. Accordingly, the Court finds that
13 Plaintiff has satisfied Article III’s standing requirements.

14 In finding that Plaintiff’s alleged injury satisfies Article III’s case-or-
15 controversy requirement, the Court notes that standing in no way depends on the
16 merits of Plaintiff’s contention that Defendants’ conduct is illegal. *See, e.g., Flast*
17 *v. Cohen*, 392 U.S. 83, 999 (1968). The validity of Plaintiff’s claim is not to be
18 conflated with Article III’s injury-in-fact requirement. The Court considers the
19 merits of Plaintiff’s claim below.

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II. Injunction

Pursuant to Federal Rule of Civil Procedure 65, the Court may grant preliminary injunctive relief in order to prevent “immediate and irreparable injury.” Fed. R. Civ. P. 65(b)(1)(A). Rule 65 also states that “[b]efore or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.” Fed. R. Civ. P. 65(a)(2).

At oral argument, the Court questioned the parties as to whether there was any reason not to make this action a final injunction. Defendants confirmed that the Court had everything necessary to make a final decision on the case, clarifying that they did not intend to supplement the record further. Plaintiff agreed with Defendants. The Court finds that there is no reason not to decide the issue as a final injunction as it appears that the parties do not have any additional evidence concerning the decision with respect to Plaintiff’s claims. Accordingly, the Court considers Plaintiffs’ request for a preliminary injunction as a final injunction.

To obtain a permanent or final injunction, a plaintiff must demonstrate: “(1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction.” *Indep. Training & Apprenticeship Program v. California*

1 *Dep't of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013). Plaintiff must
2 satisfy each element for injunctive relief. “The standard for a preliminary
3 injunction is essentially the same as for a permanent injunction with the exception
4 that the plaintiff must show a likelihood of success on the merits rather than actual
5 success.” *Id.* (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546
6 n.12 (1987)). Accordingly, the Court’s analysis remains largely the same as if it
7 were considering the Plaintiff’s original motion for preliminary injunction.

8 **A. Actual Success on the Merits**

9 This case concerns the scope of the State of Washington’s retrocession of
10 criminal jurisdiction within the Yakama Reservation. Plaintiff contends that the
11 State retroceded criminal jurisdiction “over all crimes within the Yakama
12 Reservation where an Indian is involved *as a defendant and/or victim.*” ECF No.
13 16 at 15 (emphasis added). Accordingly, Plaintiff insists that Defendants are
14 violating the Yakama Nation’s treaty rights and threatening its sovereignty by
15 exercising criminal jurisdiction over enrolled Yakama members within the Yakama
16 Reservation. *Id.* at 2. Defendants maintain that, while the State retroceded some
17 criminal jurisdiction to the United States, the State retained jurisdiction over
18 criminal offenses involving non-Indian defendants *and/or* non-Indian victims
19 within the Yakama Reservation. ECF No. 20 at 6-7.

1 Plaintiff provides four reasons why the United States reassumed “the full
2 scope of Public Law 280 criminal jurisdiction” from the State of Washington: (1)
3 in accepting retrocession, DOI interpreted the Governor’s proclamation as
4 retroceding all criminal jurisdiction over offenses whenever a Yakama member is
5 involved as either a defendant and/or victim; (2) DOI’s acceptance of retrocession
6 should be afforded judicial deference; (3) the United States Office of Legal
7 Counsel’s recent memorandum opinion should be afforded no deference; and (4)
8 Washington’s attempt to claw back jurisdiction it clearly retroceded is not
9 supported by applicable law. ECF No. 16 at 11-32.

10 In the Court’s view, Plaintiff’s arguments hinge entirely on the underlying
11 assumption that DOI, in accepting retrocession, definitively identified the scope of
12 the State’s retrocession as (1) retroceding federal jurisdiction over all offenses
13 occurring within the Yakama Reservation whenever an Indian is involved as a
14 defendant and/or victim and (2) retaining criminal jurisdiction only over criminal
15 offenses involving both a non-Indian defendant and non-Indian victim, as well as
16 non-Indian victimless crimes. ECF No. 16 at 17-18 (“Assistant Secretary
17 Washburn’s stated intent in accepting retrocession supports the State no longer
18 retaining concurrent criminal jurisdiction whenever an Indian is involved as a
19 defendant and/or victim.”). Assuming this is DOI’s interpretation, Plaintiff urges a
20 “federal-focus perspective on interpreting retrocessions,” arguing that “the

1 Department of the Interior’s actions are controlling, regardless of any other
2 governments’ and agencies’ contrary interpretation.” *Id.* at 12. And, according to
3 Plaintiff, applying the federal-focus perspective to DOI’s actions in this case
4 unambiguously support Plaintiff’s interpretation of the scope of retrocession—i.e.,
5 retroceding criminal jurisdiction over all offenses where a Yakama member is
6 involved. *Id.*

7 Unlike the Plaintiff, the Court is not convinced that DOI, in accepting
8 retrocession, necessarily understood the Governor’s retrocession proclamation as
9 an offer to retrocede criminal jurisdiction over all crimes within the Yakama
10 Reservation whenever an Indian is involved “as a defendant and/or victim.” *Id.* at
11 16-18. The retrocession proclamation, paragraph 3 provides in relevant part:

12 Within the exterior boundaries of the Yakama Reservation, the State
13 shall retrocede, in part, criminal jurisdiction over certain criminal
14 offenses not addressed by Paragraphs 1 and 2. The State retains
jurisdiction over criminal offenses involving *non-Indian defendants*
and non-Indian victims.

15 ECF No. 16-1 at 25 (emphasis added). Thus, the State expressly retained
16 jurisdiction over “all criminal offenses involving *non-Indian defendants and non-*
17 *Indian victims.*” ECF No. 6-1 at 26 (emphasis added). As noted, in the letter
18 transmitting the proclamation to DOI on January 27, 2014, Governor Inslee
19 clarified that the State’s intent in retroceding criminal jurisdiction was to retain
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1 jurisdiction whenever “non-Indian defendants *and/or* non-Indian victims” were
2 involved. ECF Nos. 1 at 14, ¶ 5.41; 16-1 at 30.

3 In DOI’s October 19, 2016, letter notifying the Yakama Nation of
4 retrocession, DOI confirmed that it had accepted the Governor’s offer of
5 retrocession and briefly addressed the “extent of retrocession” issue. ECF No. 16-
6 1 at 36. After confirming that “Washington law clearly sets forth the process for
7 retrocession of civil or criminal jurisdiction in Washington State,” DOI summarily
8 concluded that the Governor’s proclamation was “plain on its face and
9 unambiguous.” ECF No. 16-1 at 36. However, DOI then continued:

10 We worry that unnecessary interpretation might simply cause
11 confusion. If a disagreement develops as to the scope of the
12 retrocession, we are confident that courts will provide a definitive
13 interpretation of the plain language of the Proclamation. In sum, it is
14 the content of the Proclamation that we hereby accept in approving
15 retrocession.

16 *Id.*

17 Plaintiff maintains that DOI’s interpretation of the proclamation as “plain on
18 its face and unambiguous,” and its characterization of any subsequent
19 interpretation as “unnecessary,” amounts to an express rejection of Governor
20 Inslee’s subsequent clarification that the proclamation’s intent was to retain state
criminal jurisdiction over cases involving “non-Indian defendants *and/or* non-
Indian victims.” *Id.* at 16. The Court, however, disagrees. Rather than weighing

1 in on the issue, DOI expressly declined to delineate the scope of retrocession,
2 instead leaving it for the courts to “provide a definitive interpretation of the plain
3 language of the Proclamation.” ECF No. 16-1 at 36.

4 Informative and not necessarily binding on this Court, a Washington court
5 has now provided a definitive interpretation of the plain language of the
6 Governor’s retrocession proclamation and, in doing so, has clarified the scope of
7 Washington’s criminal jurisdiction within exterior boundaries of the Yakama
8 Reservation following retrocession. *See State v. Zack*, 2 Wash. App. 2d 667
9 (2018), *review denied*, 191 Wash. 2d 1011 (2018). In *State v. Zack*, Division
10 Three of the Washington Court of Appeals considered a jurisdictional challenge to
11 the scope of the State’s post-retrocession criminal jurisdiction within the Yakama
12 Reservation, almost identical to Plaintiff’s challenge here. The *Zack* court
13 determined that “[t]he jurisdiction issue turns on the meaning of the Governor’s
14 proclamation, with the dispositive question being the meaning of the word ‘and.’”
15 *Id.* at 672. The *Zack* court is the only court, state or federal, to consider whether
16 the Governor’s use of the word “and” in the contested retrocession provision
17 should be read in the conjunctive or disjunctive.

18 Performing a plain language analysis, the *Zack* court concluded that the
19 word “and” should be read in the disjunctive—i.e., “non-Indian defendant *and/or*
20 non-Indian victim”—because the conjunctive interpretation “would render the

1 proclamation internally inconsistent and nonsensical.” *Id.* As the court explained,
2 appellant’s proposed construction, and the one advanced by Plaintiff in this case,
3 “would mean that the only type of case the State could prosecute would require the
4 involvement of non-Indian defendants who victimized other non-Indians on fee
5 land.” *Id.* at 675. However, because “[t]he State already had authority to
6 prosecute non-Indians for offenses committed on deeded lands prior to the
7 enactment of Public Law 280,” and the Governor was only authorized to retrocede
8 jurisdiction acquired under Public Law 280, the *Zack* court concluded that the
9 conjunctive construction “would result in the Governor engaging in *ultra vires*
10 action.” *Id.* at 675-76 (“Asserting or removing state jurisdiction over non-Indians
11 is not within the scope of Public Law 280 or RCW 37.12.010.”). The *Zack* court
12 further observed that excluding Indians from prosecution in all cases “would mean
13 that the Governor intended to return all of the criminal jurisdiction the State
14 assumed by RCW 37.12.010 and the word ‘in part’ would be rendered meaningless
15 because there would have been total rather than partial retrocession.” *Id.* at 675.
16 For these reasons, the court held that “the State retained jurisdiction to prosecute
17 this assault against a non-Indian occurring on deeded land within the boundaries of
18 the Yakama reservation.” *Id.* at 676.

19 Though the Court is not bound by the decision, the Court finds the *Zack*
20 court’s analysis and holding persuasive, particularly when considering the

1 historical patchwork of federal, state, and tribal criminal jurisdiction on the
2 Yakama Reservation. Before the enactment of Public Law 280 or RCW
3 37.12.010, “the Yakima Nation was subject to the general jurisdictional principles
4 that apply in Indian country in the absence of federal legislation to the contrary.”
5 *Confed. Bands*, 439 U.S. at 470. Under those principles, while Indian tribes
6 generally retain criminal jurisdiction over Indians within Indian reservations, tribes
7 have no “inherent jurisdiction to try and to punish non-Indians.” *Id.*; *Oliphant v.*
8 *Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Thus, only the state possessed
9 criminal jurisdiction over non-Indians who committed crimes against other non-
10 Indians on Indian reservations. *See, e.g., Draper v. United States*, 164 U.S. 240,
11 242-43 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1882). Victimless
12 crimes committed by non-Indians in Indian country are also within the exclusive
13 jurisdiction of the state. *See Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984),
14 Neither the federal government nor the Tribe have jurisdiction for these crimes.

15 Public Law 280 authorized the State of Washington to assume full or partial
16 jurisdiction over criminal offenses and civil causes of action involving Indians in
17 Indian Country within the State’s borders. *Confed. Bands*, 439 U.S. at 471-72. In
18 1963, the State opted to assume some jurisdiction under Public Law 280. *See*
19 RCW 37.12.010. As the Supreme Court explained, “[f]ull criminal and civil
20 jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in

1 every Indian reservation and to trust and allotted lands therein when non-Indians
2 were involved.” *Confed. Bands*, 439 U.S. at 475. However, “state jurisdiction was
3 not extended to Indians on allotted and trust lands unless the affected tribe so
4 requested,” except for those eight areas of law specified in RCW 37.12.010(1)-(8).
5 *Id.*

6 When Congress amended Public Law 280 in 1968, it authorized the United
7 States to “accept a retrocession by any State of all or any measure of the criminal
8 or civil jurisdiction” previously acquired pursuant to Public Law 280. 25 U.S.C. §
9 1323(a). By Executive Order, the Secretary of the Interior was then empowered to
10 accept “*all or any measure*” of a state’s offer of retrocession. *See* Exec. Order No.
11 11435 (Nov. 21, 1968), 33 Fed. Reg. 17339-01 (Nov. 23, 1968) (emphasis added).
12 However, neither § 1323 nor the Executive Order authorize the Secretary to accept
13 *more* jurisdiction than a state initially acquired under Public Law 280. Under
14 federal law, a state may only retrocede any measure of jurisdiction “acquired by
15 such State pursuant to [Public Law 280].” 25 U.S.C. § 1323(a).

16 The State of Washington’s statute outlining the retrocession process, RCW
17 37.12.160(1), confirms that the State may only “retrocede to the United States all
18 or part of the civil and/or criminal jurisdiction previously acquired by the state over
19 a federally recognized Indian tribe, and the Indian country of such tribe.”
20 Particularly relevant here, the statute specifically defines “criminal retrocession” as

1 “the state’s act of returning to the federal government the criminal jurisdiction
2 acquired over Indians and Indian country under federal Public Law 280.” RCW
3 37.12.160(9)(b).

4 Plaintiff urges the Court to interpret the Governor’s retrocession
5 proclamation, and DOI’s acceptance of retrocession, as retroceding all criminal
6 jurisdiction over crimes committed within the Yakama Reservation, including land
7 held in fee by Indian and non-Indian owners, whenever an Indian is involved as a
8 defendant and/or victim. ECF No. 16 at 18. Stated differently, Plaintiff maintains
9 that “[t]he only criminal offenses over which the State retained jurisdiction are
10 those involving both a non-Indian defendant and non-Indian victim, as well as non-
11 Indian victimless crimes.” *Id.* at 17-18. Plaintiff claims that DOI’s acceptance of
12 retrocession “does not leave open the possibility of the State continuing to play a
13 role in Indian-involved crimes within the Yakama Reservation.” ECF No. 16 at
14 16.

15 However, interpreting the Governor’s retrocession proclamation as Plaintiff
16 insists “would result in the Governor engaging in an *ultra vires* action,” as the offer
17 of retrocession would be *returning* more jurisdiction to the United States than the
18 State assumed under Public Law 280 and RCW 37.12.010. *Zack*, 2 Wash. App. 2d
19 at 676. As noted, the State’s authority to prosecute non-Indians for crimes
20 committed against non-Indians on the Yakama Reservation preexists Public Law

1 280 or RCW 37.12.010. Under Plaintiff’s interpretation, the State would be
2 “retaining” jurisdiction that it simply did not acquire from the United States
3 pursuant to Public Law 280. The Court accepts the *Zack* court’s logical
4 interpretation, which is consistent with Public Law 280 and RCW 37.12.160’s
5 instructions.

6 Reading the Governor’s use of the sentence “The State retains jurisdiction
7 over criminal offenses involving non-Indian defendants and non-Indian victims.”
8 in context, both historical and in the context of the entire retrocession
9 proclamation, also makes it plain that the State was retaining jurisdiction in two
10 areas—over criminal offenses involving non-Indian defendants and over criminal
11 offenses involving non-Indian victims. The plain reading of the language thus,
12 also shows the limitation of the States’ retrocession.

13 Moreover, Plaintiff’s interpretation directly contradicts Governor Inslee’s
14 stated intent to “retrocede, *in part*, criminal jurisdiction.” ECF No. 16-1 at 26
15 (emphasis added). Under Plaintiff’s view of the scope of retrocession, the State
16 retroceded all criminal jurisdiction assumed under Public Law 280, retaining only
17 that jurisdiction that predated Public Law 280—i.e., the “authority to punish
18 offenses committed by her own citizens upon Indian reservations.” *Draper v.*
19 *United States*, 164 U.S. 250, 247 (1896). This interpretation is at odds with
20 Governor Inslee’s stated intent of retroceding some, but not all, criminal

1 jurisdiction acquired under Public Law 280. The Court cannot reconcile Plaintiff's
2 illogical interpretation of the scope of retrocession with the plain language of the
3 Governor's retrocession proclamation, or federal and state law.

4 The Court concludes that the State retained jurisdiction over criminal
5 offenses where any party is a non-Indian. This interpretation is consistent with the
6 plain language of the Governor's retrocession proclamation, DOI's acceptance, and
7 federal and state law governing the retrocession process. Accordingly, the Court
8 finds that Plaintiff fails to establish success on the merits of its claims because
9 Defendants have criminal jurisdiction over offenses committed by or against non-
10 Indians within the Yakama Reservation.

11 **B. Irreparable Injury, Hardships, & Public Interests**

12 The Tribes' sovereignty has not been wrongfully diminished by the partial
13 retrocession of jurisdiction preformed in accordance with the governing federal
14 and state law. Accordingly, the Court finds that Plaintiff has not established
15 irreparable harm and there are no hardships or public interests to be considered.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Preliminary Injunction (ECF No. 16), converted to
3 a request for a Permanent Injunction, is **DENIED**.

4 2. All remaining deadlines, hearings and trial are **VACATED**.

5 The District Court Executive is directed to enter this Order and Judgment for
6 Defendants accordingly, furnish copies to the parties, and **CLOSE** the file.

7 **DATED** February 22, 2019.



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Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge